IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| CHARLA ALDOUS, P.C., d/b/a ALDOUS LAW FIRM AND CHARLA ALDOUS, | § | |
| Plaintiffs, | § | |
| v. | § | CIVIL ACTION NO. ________________ |
| TERESA LUGO AND DARWIN NATIONAL ASSURANCE COMPANY, | § | |
| Defendants. | § | |

**SECOND NOTICE OF REMOVAL**

Pursuant to 28 U.S.C. § 1446(a), Defendant Darwin National Assurance Company ("Darwin") files this Second Notice of Removal and shows:

**I.**
**PROCEDURAL HISTORY**

1. On November 14, 2012, plaintiffs, Charla G. Aldous, P.C., d/b/a Aldous Law Firm and Charla Aldous (collectively "Aldous"), filed this lawsuit—styled as *Charla G. Aldous, P.C., d/b/a Aldous Law Firm and Charla Aldous v. Holly Black and Darwin National Assurance Company*, Cause No. CC-12-06826-A, in County Court at Law No. 1 of Dallas County, Texas. The lawsuit involves a dispute over reimbursement of attorney's fees and expenses for Aldous' own selected counsel defending Aldous (and others) in an underlying lawsuit for legal malpractice.

2. In state court, Aldous first sued two defendants: (1) Darwin, her liability insurance carrier, and (2) Ms. Holly Black, the insurance agent employed by HUB International

Rigg ("HUB") who allegedly made misrepresentations upon which Aldous relied in choosing Ms. Black to act as her agent to procure the Darwin policy.

3. On December 7, 2012, Darwin removed the case to this Court on the basis of diversity of citizenship, and it was assigned Civil Action No. 3:12-CV-5028-G. In the first removal, Darwin asserted that Ms. Black was improperly joined as a non-diverse defendant, based on the inability of Aldous to establish a cause of action against Black. [Doc. #1.] On January 3, 2013, Aldous moved to remand the case back to state court. [Doc. #15.] On June 20, 2013, this Court's Memorandum Opinion and Order granted Aldous' Motion to Remand, and remanded the case to County Court at Law No.1. [Doc. #22.]

4. Just over a month after remand, Aldous dropped all claims against Black—the only non-diverse defendant at the time of Darwin's first removal. Aldous filed a "Notice of Nonsuit without Prejudice of Defendant Holly Black" in state court on July 30, 2013. On the same day, Aldous filed a First Amended Original Petition, asserting the identical allegations and claims previously asserted against Black against a new defendant, Teresa Lugo, also allegedly employed by HUB. The County Court entered an Order of Nonsuit of Holly Black on July 31, 2013.[1]

5. Darwin hereby removes this case for a second time. The pleadings filed by Aldous in state court after remand reveal, not only a new and different ground for removal, but that the first removal was proper and this Court has diversity jurisdiction. Plaintiffs are engaging in impermissible forum shopping by asserting causes of action against a non-diverse defendant against whom they have no intent to proceed to judgment, only to avoid diversity jurisdiction and

[1] Copies of Aldous' Nonsuit of Black, the First Amended Original Petition, and the Court's Order of Nonsuit are included as documents 15, 17 and 19 in the Index of Documents filed in state court, attached as Exhibit "A" hereto

obtain remand. Furthermore, the causes of action now asserted against Ms. Lugo are no more viable than they were against Ms. Black.

## II.
## IMPROPER JOINDER

### A. Manipulating Parties and Claims to Defeat Diversity Should Not be Sanctioned.

6. Under the doctrine of improper joinder, this Court should disregard the citizenship of nondiverse defendants when the plaintiff has no possibility of establishing a cause action against the nondiverse defendant. *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568, 573 (5th Cir. 2004); *Nava v. OneBeacon Am. Ins. Co.*, 2011 U.S. Dist. LEXIS 27027 at *9 -10 (W.D. Tex. Mar. 15, 2011). A plaintiff's failure to plead a legally sufficient factual basis for any element of the claims alleged against the nondiverse defendant constitutes improper joinder. *See Griggs v. State Farm Lloyds,* 181 F.3d 694, 700-02 (5th Cir. 1999); *Druker v. Fortis Health,* 2007 U.S. Dist. LEXIS 402 (S.D. Tex. Jan. 4, 2007).

7. Federal courts should not "sanction devices intended to prevent the removal to a federal court where [a defendant] has that right." *Smallwood,* 385 F.3d at 573. Courts find removal as proper when a plaintiff joins a non-diverse defendant without a good faith intent to pursue any claims against that defendant. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 99 (1921) (affirming denial of remand where it was apparent that a non-diverse defendant was joined "without any purpose to prosecute the action in good faith against him and with the purpose of fraudulently defeating the . . . right of removal."). This doctrine is consistently applied by federal courts in Texas. *See Franz v. Wyeth,* 431 F.Supp.2d 688, 690 (S.D. Tex. 2004)(finding the inclusion of non-diverse doctors was improper and constituted fraudulent joinder where plaintiffs had no intention of pursuing a claim against them).

8. On June 20, 2013, this Court's Memorandum Opinion and Order granted Aldous' Motion to Remand, holding that while some of Black's alleged representations constitute non-actionable "puffery," Aldous relied on other representations that were actionable as pleaded. [Doc. # 22 at 11-12.]

9. Although Plaintiffs were careful in resisting the first removal to argue that the inclusion of Ms. Black was facially proper, their actions demonstrate that they never had an intention to pursue claims against Ms. Black and those claims were never viable. To obtain remand, Plaintiffs cited their pleading allegations that Aldous "personally interviewed Ms. Black," and that Black made "negligent misrepresentations . . . in persuading Ms. Aldous to do business with her." [Plaintiff's Motion to Remand, Doc. #15, at 1.] Plaintiffs asserted that Black was "properly joined" in the lawsuit, and their pleading "properly pleads a cause of action for negligent misrepresentation against her." *Id.* at 2. Plaintiffs identified specific misrepresentations by Black in support of this claim: that Ms. Black (1) would find an insurer that did a large amount of business locally and would assign a local adjuster, (2) would place Plaintiff's policy with an insurer that would give Black input on assigning the adjuster, and (3) would have influence with the adjuster to assist Aldous to obtain timely coverage and payment. *Id.* at 3. Notably, the motion to remand presented no evidence, but contained only unverified assertions by counsel that the misrepresentation allegations were plausible on the face of the pleading.

10. In remanding the case, this Court found that the first alleged representation against Black (that she would place the policy with an insurer that did a large amount of business locally that would assign a local adjuster) stated a viable cause of action. [Doc. #22 at 12.] In accepting Plaintiffs' arguments to remand, the Court found that "Aldous relied on receiving

those benefits in selecting Black as her agent." *Id.* Thus, the Court held that, because there was some possibility of success on the misrepresentation claim, Black was properly joined and the case should be remanded.

11. However, Aldous quickly dropped all claims against Black after the case was remanded. The July 30, 2013 Nonsuit dismissed all claims against Black, and demonstrates the intent not to pursue Black. On the same day, Aldous filed a First Amended Original Petition, asserting the exact same (word-for-word identical) allegations and claims that were previously asserted against Black against a new defendant, Teresa Lugo, also allegedly employed by HUB.[2] Thus, not only have all claims against Black been dismissed, but Plaintiffs allege that the agent "personally interviewed" by Aldous and the agent that made the identical representations once alleged against Black was in fact a different agent at HUB, Ms. Teresa Lugo. In light of the nonsuit and pleading amendment in state court barely a month after remand, it is clear that there never was a possibility of success on any misrepresentation claim against Black and Plaintiffs did not intend to pursue Black. Regardless, Plaintiffs' arguments in support of remand that the misrepresentation claim was viable against Black were, at a minimum, incorrect.

12. Notably, in granting remand, this Court stated that "there is no indication that plaintiffs were ever uninterested in pursuing Black." [Doc. # 22 at 11-12.] Plaintiffs have now unequivocally demonstrated their intent not to pursue Black.

13. Texas federal courts regularly observe that "[t]he right to remove depends upon the plaintiffs' pleading at the time of the petition for removal." *USA Heavy Lift Cargo Consultants Ltd. v. Combi Lift USA Inc.*, 2012 U.S. Dist. LEXIS 90758 at *11-12 (S.D. Tex. June 28, 2012). In *USA Heavy Lift*, the court dismissed a non-diverse defendant where plaintiff's

[2] *Compare* Plaintiff's Original Petition, attached as document 3 in Exhibit "A," to Plaintiff's First Amended Original Petition, attached as document 15 in Exhibit "A."

motion for leave to amend its pleading to assert different causes of action against the non-diverse defendant "acknowledged" that the original claims lacked merit. *Id.* Like in *USA Heavy Lift*, because there were never any viable claims against Black and Black was therefore improperly joined as a defendant, Plaintiffs' arguments in support of remand were either disingenuous or incorrect. The absence of viable claims against the only non-diverse defendant at the time of the first removal demonstrate the existence of diversity jurisdiction.

14. Abandoning claims against a non-diverse defendant admittedly makes a case removable at the time of abandonment: ". . . when a Plaintiff, at whatever time and for whatever reason, indicates a desire to completely abandon the claims against all non-diverse defendants, those defendants are fraudulently joined, and the case becomes removable *at that moment.*" *Ramirez v. Michelin N. Am., Inc.*, 2007 U.S. Dist. LEXIS 52244, *10 (S.D. Tex. July 19, 2007)(emphasis added), *quoting Franz v. Wyeth,* 431 F.Supp.2d 688, 690 (S.D. Tex. 2004). However, cases also suggest that improper joinder exists where plaintiffs have no good faith intention of pursuing their claims against the non-diverse defendant. *Id.* at *11, n 8. The present lawsuit—involving claims first asserted against non-diverse Black, only to be dropped barely a month after remand of the case based on the plausibility of such claims—demonstrates that there was never an intent to pursue such claims. Courts have also upheld removal on equitable grounds to avoid "attempt[s] to circumvent the target defendant's valuable right to a federal forum," even in the absence of a "direct admission of manipulation." *Davis v. Merck & Co.*, 357 F. Supp. 2d 974, 979 (E.D. Tex. 2005).

15. Additionally, the Fifth Circuit has held that section 1446(b) providing the procedure for removal of cases "is not inflexible," and "the conduct of the parties" may effect whether removal requirements are subject to equitable considerations. *Tedford v. Warner-*

*Lambert Co.*, 327 F.3d 423, 428-429 (5th Cir. Tex. 2003). In *Tedford*, the plaintiff "attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights" by filing a nonsuit against the non-diverse defendant within days after the one-year limit for removal in § 1446(b) had expired. *Id.* The Court held that "equity" required extension of the one-year limit for removal, and affirmed denial of a motion to remand. *Id.* at 429; *see also Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986) (indicating that the thirty-day time limit of § 1446 to remove is subject to equitable considerations). As a matter of equity, Plaintiffs should not be able to resist remand by asserting that claims and allegations against a non-diverse defendant are viable, only to drop all such claims immediately after remand. Plaintiff's actions demonstrate that diversity jurisdiction existed at the time of the first removal of this case, and devices intended to prevent that proper removal to federal court should not be sanctioned.

**B. Misrepresentation Claims Against Lugo Also Fail.**

16. Separate and apart from Plaintiffs' actions demonstrating that the claims against Black lacked viability and that Black was improperly joined at the time of the first removal, the new non-diverse defendant, Teresa Lugo, has also been improperly joined.

17. This court has already held that three out of the four alleged representations in Plaintiffs' pleading "clearly constitute" non-actionable "puffery." [Doc. #22 at 11.] These allegations—once asserted against Black and now asserted identically against Lugo—therefore do not state a viable cause of action for misrepresentation. *See Dowling v NADW Marketing, Inc.* 631 S.W.2d 726, 729 (Tex. 1982)(defining puffery as an expression of opinion by a seller not made as a representation of fact); *see also Griggs v. State Farm Lloyds,* 181 F.3d 694, 700-02 (5th Cir. 1999). Federal courts permit removal despite improper joinder when the state court

petition contains only puffery or conclusory allegations. *See Tracy v. Chubb Lloyds Ins. Co.*, 2012 U.S. Dist. LEXIS 44984 at *8 (N.D. Tex. Mar. 30, 2012); *Weldon Constr. Ltd. v. Fireman's Fund Ins. Co.*, 2009 U.S. Dist. LEXIS 43420 at *2 (N.D. Tex. May 22, 2009).

18. The representations that Lugo would "have input in selecting the adjuster, that she would have influence over the adjuster, that she would assist Aldous with potential claims, and that she would find an insurer with a reputation for paying claims" are—as this Court held—based on Lugo's "opinion and her own self-promotion." [Doc. #22 at 11 (referencing representations previously alleged against Black that are now alleged against Lugo in Plaintiff's First Amended Original Petition at 7).] Plaintiffs therefore have no possibility of success on a misrepresentation claim against Lugo based on these same allegations.

19. The one representation that could not be dismissed as mere "puffery" was the alleged statement that "Aldous would be placed with an insurer that did a large amount of business locally and that would assign a local adjuster in the event of a claim." [Doc. #22 at 12.] However, a misrepresentation claim against Ms. Lugo based on this alleged statement is not plausible either.

20. Plaintiffs allege that Ms. Lugo was the agent that Aldous "*personally interviewed*" in seeking an insurance agent to procure liability coverage in the Winter or early Spring of 2010. *See* Plaintiff's First Amended Original Petition at 3, ¶ 10 (emphasis added). The Policy incepted on March 1, 2010. *Id.* at 4, ¶ 15. As previously alleged against Black, Plaintiffs now allege that Ms. Lugo made representations "[i]n persuading Ms. Aldous to do business with her," and that Ms. Lugo "touted" her qualifications "*[d]uring their discussions*." *Id.* at 3, ¶¶ 11 -12 (emphasis added). With respect to the one representation that this Court viewed as viable, Plaintiffs allege that "Ms. Aldous *told* Ms. Lugo that she required an insurer

that did a large amount of business locally, and, in the event of a claim, would assign a local adjuster," and that Lugo represented that she would find such an insurer. *Id.* at 3, ¶¶ 12 -13 (emphasis added).

21. However, Ms. Lugo never met Ms. Aldous in person, and has no recollection of ever speaking with Aldous or the Aldous Law Firm. Ms. Lugo therefore could not have been told that Aldous wanted a local insurer with a local adjuster and could not have been "personally interviewed" by Aldous. Ms. Lugo also left the employ of HUB in January of 2011, prior to the February 2011 counterclaims by Albert Hill against Aldous for which insurance coverage was sought. Because Lugo never met in person with Aldous, there is no possibility of success for misrepresentation claims based upon what was allegedly communicated in person to select an agent and procure insurance. Because Lugo was not employed as an insurance agent at HUB by the time of the February 2011 claim, there is no possibility of success on a misrepresentation that may have occurred at the time of the subject claim either.

22. Finally, Aldous' claim against Ms. Lugo has no chance of success, because it is barred by the statute of limitations. Negligent misrepresentation is governed by a two-year limitations period in Texas. TEX. CIV. PRAC. & REM. CODE §16.003. Aldous accuses Lugo of misrepresenting that "she would place Aldous' insurance business with an insurer that did a large amount of business locally, and, in the event of a claim, would assign a local adjuster, with knowledge of and ties to the community." Plaintiff's First Amended Original Petition at 7, ¶26. The claim for which Aldous seeks coverage was made on February 15, 2011. *Id.* at 4, ¶16. Aldous began communicating with Darwin's claims analyst on February 22, 2011, communications which reflected the adjusters' location in Farmington, Connecticut. *See* Declaration of Stephanie Lizotte at ¶2, attached hereto as Exhibit "B" and incorporated herein.

Because Aldous knew that her claim was not assigned to a local adjuster in February of 2011, the Negligent Misrepresentation claim asserted for the first time against Ms. Lugo in Plaintiffs' First Amended Original Petition filed on July 30, 2013 is barred by the two–year statute of limitations.

23. Because there is no possibility that Aldous can establish a viable cause of action against Lugo, the Court should disregard the citizenship of Lugo for diversity jurisdiction. *See Larroquette v. Cardinal Health 200, Inc.* 466 F.3d 373, 376 (5th Cir. 2006)(finding improper joinder where the "factual contentions cannot reasonably support" the legal claims asserted). A "reasonable basis 'means more than a hypothetical basis.'" *Icon Benefit Adm'rs II, L.P. v. Wachovia Ins. Servs.*, 2008 U.S. Dist. LEXIS 51580, *5 (N.D. Tex. July 3, 2008) (Lynn, J.) (citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999) ("whether the plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiffs' allegations and the pleaded theory of recovery")).

## III.
## JURISDICTIONAL FACTS

24. Charla G. Aldous, P.C. is a professional corporation organized and existing under the laws of the State of Texas. Its principal place of business is in Dallas County, Texas. Petition at 1, ¶ 2. Under applicable law, therefore, Charla G. Aldous, P.C. is (both now and when this action was filed) a citizen of the State of Texas. Aldous individually is a citizen of Texas. *Id.* at 1, ¶ 3.

25. Darwin is a corporation organized under the laws of Delaware and has its principal place of business in Delaware. Under applicable law, therefore, Darwin is (both now and when this action was filed) a citizen of the State of Delaware.

26. Aldous' Original Petition alleged that Holly Black is a Texas citizen and the First Amended Original Petition alleges that Teresa Lugo is a citizen of Texas. However, Black was

improperly joined as a defendant in this lawsuit at the time of the first removal, and Lugo is improperly joined as a defendant in the lawsuit now. Their citizenship should be disregarded for purposes of determining diversity jurisdiction.

27. To the extent necessary, Lugo consents to the removal of this case, and authorized the undersigned to state such consent in this Notice.

28. "A notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28. U.S.C 1446 (b)(3). The first removal was timely filed within thirty (30) days of service of Plaintiff's Original Petition and citation, and this removal is timely filed within thirty (30) days of the July 30, 2013 Notice of Nonsuit and First Amended Original Petition filed in state court, from which it could be ascertained that the case is removable. *See* 28 U.S.C. § 1446(b).

29. This is a civil action over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332, and is one which may be removed to this Court pursuant to 28 U.S.C. § 1441, because the case is a civil action between citizens of different states wherein the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

30. As to the amount in controversy, Plaintiffs do not assert a specific dollar amount of damages in the state court Petition. However, this is a dispute over attorneys' fees incurred in an underlying lawsuit against Aldous, and Darwin has paid over $495,000 on Aldous' behalf in the underlying lawsuit. Aldous' counsel in the underlying lawsuit declared under penalty of perjury that $2,054,178.18 of reasonable and necessary attorney's fees and expenses were incurred for the prosecution of affirmative claims, and $668,068.31 of reasonable and necessary attorney's fees and expenses was incurred in defense of counterclaims. *See* Declaration of

Stephanie Lizotte, attached hereto as Exhibit "B" and incorporated herein. Aldous seeks payment from Darwin of all reasonable and necessary attorney's fees and expenses incurred by them in defending against the underlying action. *Id.* Aldous also asserts that affirmative and defensive claims in the underlying action were inextricably intertwined, such that both were encompassed in Darwin's duty to defend. *Id.*; *see also* Plaintiffs' First Amended Original Petition ¶21. Aldous also seeks three times the amount of her alleged damages and an 18% penalty pursuant to the Texas Insurance Code. *Id.* at ¶¶ 35, 36. Thus, the $75,000 amount in controversy requirement of 28 U.S.C. §1332 is satisfied by the damages asserted in this dispute.

31. In light of the improper joinder of Black and Lugo, and because Charla G. Aldous, P.C. and Aldous individually are citizens of Texas and Darwin is a citizen of Delaware, complete diversity of citizenship exists between the proper parties pursuant to 28 U.S.C. §1332. Such diversity existed both at the time of the service of the Nonsuit and Plaintiff's First Amended Original Petition and also at the time of this removal.

32. Removal of this case to this Court is proper under 28 U.S.C. § 1441, because this is a civil action of which the district courts of the United States have original jurisdiction.

33. In accordance with 28 U.S.C. § 1446(a) and Local Rule 81, an index and copies of all process, pleadings, and orders filed in the state court action as of this date, and a copy of the court's docket sheet are attached hereto as Exhibit "A."

34. Promptly after the filing of this Notice of Removal, Darwin shall give written notice of the removal to Aldous through its attorneys of record and to the clerk of the state court as required by 28 U.S.C. § 1446(d).

WHEREFORE, Darwin requests that this action now pending against it in County Court at Law No. 1 of Dallas County, Texas, be removed to the United States District Court for the

Northern District of Texas, Dallas Division, as an action properly removable thereto and seeks general relief.

Respectfully submitted,

**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**

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**ATTORNEYS FOR DEFENDANT, DARWIN NATIONAL ASSURANCE COMPANY**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record via the Court's ECF electronic notice system on August 21, 2013.

/s/ Thomas M. Spitaletto
Thomas M. Spitaletto